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Duke Crowley's final examination: Another kind of evidence column

By Cynthia Ford

All of us lost an icon of the Montana Bar last month when Duke Crowley retired from life. I lost a wonderful mentor, colleague and friend—one of only two people I have ever let call me “Cindy.” (Dave Patterson, whom I also hold in high esteem, is the other). Duke taught me a lot about teaching law in general, and about teaching both Civil Procedure and Evidence. My first day at UMLS, long after I had sold both my practice and my house to take this leap into academia, he disclosed that many on the faculty had opposed my hiring. My second day on the job, Duke set about showing me how to prove them wrong—if I haven’t, it is not his fault. He shared all of his techniques with me, including the fabled (and much maligned) “grid” system of grading. I made a lot of changes over the years (such as encouraging student participation in class discussion and including Indian law in Civil Procedure), but Duke’s advice remains the essence of my approach to my courses and work with the Bar.

Duke’s were big shoes to fill, and in fact I never did. Duke taught nothing but required courses: Civil Procedure I and II, Criminal Law and Procedure I and II, and Evidence. I was hired to teach Civil Procedure and some electives; the law school later hired Melissa Harrison to take over the Criminal Law courses and some electives, while Duke continued with Evidence until his full retirement, when I assumed that course too. The math is obvious and hopefully not gendered: it took two full-time faculty to carry the Duke’s water. (That is why I will never be the Duchess.)

In tribute to Duke, I am using the opportunity to do a sort of evidence quiz, based on his obituary that appeared in the Missoulian. I have inserted numbers in several places, which relate to the underlined sections immediately preceding the number. As you encounter each, consider what objection you might make, what response you would make if the objection were made, and what ruling the judge should make. If you think the ruling will exclude the evidence, identify how you would get this information into evidence: what witness or exhibit you would need, given that Duke is now unavailable. My own analyses, based solely on the text of the MRE, appear in the numbered endnotes. (If I were preparing for trial, I would include both excerpts from the Comments to the MRE and actual cases on point). Relevance is off the table; assume that the case, whatever it is, requires proof of these facts.

Obituary

“Duke” William Crowley was a Prince of a Man², and a

King of Montana law. His reign³ ended when he died at home in Missoula on Wednesday, June 25, 2014, at the age of 91.⁴ It began in Walkerville (although Butte, America, has always claimed Duke as one of its own) in 1923.⁵ In between, Duke’s resume shows that he worked in the mines; served in the military; graduated from the University of Montana School of Law, earned an L.L.M. degree from N.Y.U. (in tax of all things)⁶, married and raised two sons, and read every book in the Missoula Public Library⁷.

If you didn’t know Duke yourself, you probably saw him walking across the Madison Street Bridge on his way to the library, always dapper in an overcoat and fedora. He eschewed exercise for its own sake, but logged miles and miles on his own two feet. He also was a fixture for years at the University dining hall; once his wife was no longer able to cook, Duke ate dinner daily with the undergraduates (and those law students smart enough to garner the benefit of Duke’s experience, wisdom, and endless stories of Montana legal happenings).

If you did know Duke in some capacity, you knew that he was amazing at his job. What you probably did not know, though, was the sheer number and diversity of those jobs, and how influential “that guy from Butte” was in each of them. He served as an Assistant Attorney General, a Deputy County Attorney, and as a private practitioner for the first fourteen years of his career, gaining experience in both criminal and civil law.

In 1966, the law school wooed him into joining the faculty, where he carried an enormous course load for the next 40 years. Singlehandedly, “the Duke” taught the required courses in Civil Procedure, Criminal Law and Procedure, and Evidence to every Montana law student for 24 years. In 1990, he finally was afforded some relief: the law school hired a new professor to take over Civil Procedure. Two years later, another new professor took over Criminal Law and Procedure. Even then, Duke continued to teach all 80-some second year students Evidence until he finally completely retired in 2005.

Although many Montana professors use nationally-published books for their courses, Duke did not believe they provided enough information about Montana law, so he compiled and annually updated his own books in each subject he taught.⁸ His classroom lectures are famous in Montana legal circles, and almost every lawyer who ever learned from Duke can (and at the drop of a hat, will) recall and deliver some classic “Crowleyism.” All in all, Duke taught more than 3,000 law students, and he cared very deeply about each one of them. Duke’s students are now scattered around the state and the country, passing on to their mentees the knowledge and skills they learned from Professor Crowley.

Duke's painstaking dedication to legal education was matched by his extraordinary public service to Montana outside the law school. The list of his appointments to state and Supreme Court commissions goes on and on; suffice it to say that Duke was a principal architect of Montana's current Criminal Code, Rules of Evidence, statutes of limitation, venue statutes, and the overall structure of both the executive and judicial branches of state government. Duke's willingness and ability to work for the improvement of Montana has made our state, and our own lives, immeasurably better.

Duke's native intelligence and work ethic played a major part in his accomplishments and impact. However, Duke himself was always quick to credit two enormous outside influences in his life.⁹ First, he described himself and his career as the product of the G.I. Bill. Duke was working in a mine in Butte, with no prospect of higher education, before he entered the military. Once he was discharged, he said, the world opened before him, and the next thing he knew, he was a lawyer, never to toil underground again.

The other major influence in Duke's life was Elaine (Hausted) Crowley, from "Andaconda." They married and raised two sons, Paul and Matthew. Missoulian readers will remember Elaine Crowley's many letters to the editor, often penned from her bedside "office" once she was confined to home by ill health. Duke was enormously proud of his wife and both of his sons, and bereft when Paul and Elaine predeceased him.

Matt was a great help to Duke in his last years, returning to the family home from Seattle to take care of his father. Neighbor Robin Ammons and caretaker/friend "Jay" (Jalaine Wark) provided occasional respite care, easing Duke's withdrawal from the external world. With their help, Duke was able to continue to hold court in his living room and kitchen, where Professor David Patterson and his wife Jeanie, Judge Ed McLean, Missoula County Attorney Fred Van Valkenburg, Randy Harrison¹⁰ and others visited periodically. Duke treated his caretakers and visitors to his incredible memory and witty, albeit acerbic, observations about Montana politics and history.

A memorial service will be held at the Law School this fall. In the meantime, please forward your favorite Duke stories and "Crowleyisms" to Kathleen.reeves@umontana.edu.¹¹ Gifts in Duke Crowley's memory can be made to the University of Montana Foundation for the William F. (Duke) Crowley Endowment and mailed to The UM Foundation, Post Office Box 7159, Missoula, MT 59807-7159.

One of Duke's oft-repeated sayings was "Where the sidewalk stops, so does Crowley."¹² He was wrong: the sidewalk has stopped, but Duke's legacy lives on.

Conclusions

First off, at trial I would not actually make many of the objections I have scattered through the obituary. I believe in fewer but better objections, both for the sake of time and administration of justice and for not appearing stupid. However, I would include all of them in my trial preparation, so that I at least know that they are possible and what result I expect. If I am pretty sure my objection would be overruled, I am not likely to make it, but I can't make that decision until I have assessed

the possible response from my opponent. On the other hand, if I am the proponent, I want to be sure I have accounted for all the possible objections my opponent might make, whether or not I think they are lame. I will include in that section of my trial notebook the questions [and answers] I intend to use, and right there the possible objections and the responses I will make. That will help me identify the "easiest route to admissibility" too.

Most, but not all, of the objections here are hearsay-based, or its flip side, "foundation" which is the same as "lack of personal knowledge." Most of the objections are relatively easy to defeat, too, so one big lesson is to not be too scared of the hearsay rule. If you anticipate an objection on this basis, and know the definitional requirement (801c), exemption (801d), or exception (803 or 804), which will get around the hearsay problem, build that into your examination before you ask the actual hearsay-like question. Either I will see that you are a step ahead of me, and will refrain from making the objection at all, or I will make a poor objection and the judge's ruling will communicate to the jury that you have the upper hand.

The "better route" to admissibility usually reflects the overall purpose of both Rule 602 and 802: to seat a live witness who actually perceived the event, who will recount to the jury his or her direct memory of that event. As soon as the evidence becomes more indirect, it also becomes much less accurate and trustworthy. If there is a live percipient witness who remembers and can communicate that memory to the court, you can prevent any objection either as to foundation and as to hearsay. The lead-in to the "what happened" question should be: "Do you know [what happened]? [Yes. (If not, might as well shoot the witness or yourself)] How do you know? [I was there and saw it] What happened/did you see?"

If you understood most of the objections, and either why my analysis is right or have a good reason for disagreeing with that analysis, you are using the evidence rules and legal reasoning tools which Duke Crowley so ably imparted. If you graduated from UMLS during his tenure there, you studied at the feet of the master. If you graduated after Duke retired, your instruction derived largely from Duke's earlier work. If you, sadly¹³, did not go to UMLS, you still owe Duke homage because he was responsible for so much of Montana's laws and rules of evidence, civil procedure and criminal procedure.

Endnotes

1 OBJECTION: Hearsay. Any writing, including one published in a newspaper, is an out-of-court statement, and this is being offered for the truth of what it asserts. 801c defines hearsay, 802 prohibits it.

RESPONSE: 803(17) provides an exception to the hearsay rule for commercial publications.

RULING: Sustained. (Proponent, you have to be kidding me. 803(17) applies to "market quotations, tabulations, lists, directories, or other published compilations, general used and relied upon by the public or by person in particular occupations." This clearly does not cover all articles, even obituaries, published in a commercial newspaper. The impetus for accuracy for stock market reports certainly does not extend to obituaries.)

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ROUTE TO ADMISSION: None. The obituary itself is not going to be admissible. I am going to have to call live witnesses or introduce admissible documents.

From here on out, assume that the sentences are spoken by a live witness.

2 OBJECTION: inadmissible character evidence, Rule 404. This has to be a civil case, because you can't prosecute someone who is dead. 404a absolutely prohibits the use of character evidence in civil cases. Furthermore, Duke can't be a witness, so even his character for truthfulness is inadmissible.

RESPONSE: Oh, dear. How about offered to show something other than propensity?

RULING: Sustained, unless you can actually identify the non-propensity relevant fact this evidence would show. Character is not allowed, because of the temptation it creates for a jury to condemn a bad person or pardon a good one on general principles, rather than the exact conduct proven (or not) in the case. In its way, this rule also conforms to the "every day a new beginning" concept: bad guys sometimes do good things, and even good people commit bad acts.

EASIEST ROUTE TO ADMISSION: Avoid the "what kind of guy" phrasing, and instead ask about Duke's acts and their effects, rather than his character.

3 OBJECTION: Lay opinion.

RESPONSE: RULE 701 allows lay witnesses to testify in the form of opinions, so long as those opinions are rationally based on the perception of the witness and helpful to the jury.

RULING: Sustained. This is opinion, for sure, but is not "rationally based on the perception of the witness" in the same way as "I think he was driving about 60 mph because he was going faster than I, and my speedometer said 57." (My favorite 701 ruling is that Montanans can testify about drunk, because we all know that when we see it; not so for effects of prescription drug use). Further, the jury could itself come to that opinion if the witness[es] gave "the facts, ma'am, just the facts." "King" and "reign" are fine for closing argument, but probably violate a strict interpretation of Rule 701.

ROUTE TO ADMISSION: Call a series of witnesses who can testify from personal knowledge that Duke did ... or affected [NOT!! Effected] law in Montana, such as deans, colleagues, students, members of commissions on which he served.

4 OBJECTION: lack of personal knowledge, Rule 602; hearsay, Rule 802.

RESPONSE: The witness was there, and had personal knowledge of the occurrence, time and place of death.

RULING: Overruled.

EASIEST ROUTE TO ADMISSION: Obtain and submit a certified copy of the death certificate. It falls under 802(9), record of vital statistics. The certification sidesteps the authentication requirements of Rule 901, via 902(4).

5 OBJECTION: Hearsay, lack of personal knowledge (same as above). Even if the witness were there when Duke died, he would not have personal knowledge of Duke's age, which requires knowing his birthdate. Even Duke himself did not KNOW when or where he was born (none of us do, so your birthday is rank hearsay ☹).

RESPONSE: If the witness is a family member, and knows that the family reputation is that Duke was born, 803(19) provides an exception to the hearsay rule.

RULING: overruled.

EASIEST ROUTE TO ADMISSION: The death certificate probably contains both the date and place of birth, so that might do double duty. If that information is not on the death certificate, then simply obtain a certified copy of the birth certificate as well, to meet both 802(9) and 902(4).

6 OBJECTION: hearsay. The resume is an out of court statement, Rule 802.

RESPONSE: This is not offered for the truth of the matter asserted. (This is the only way to escape the bar of 802; there is no exception to the rule or exemption to the definition which would apply).

RULING: Then what is it offered for? If the proponent can come up with some relevant, non-truth-of-the-matter purpose, the judge should overrule the objection. In this case, the opponent should ask for a limiting instruction under Rule 105. If there is no real alternative purpose, the judge should sustain the objection.

EASIEST ROUTE TO ADMISSION: If in fact you need to prove each of the asserted propositions, you should do so individually. For those events where a living person actually observed Duke in the described role, that person can testify orally. Official documents are even more efficient, but of course require work ahead of time to gather appropriately formalized versions: military discharge papers (public records, 803(8)), transcripts and diplomas from the educational institutions (business records, 803(6)), and mine employment records (also business records, 803(6)). Note that the business records exception in Montana state courts requires a live custodian of records to testify to the foundational facts, unless the other side will stipulate to the admissibility. Unless there is doubt about the foundation, your opponent should do so, as you should for her. In the FRE, updated 803(6) dispenses with this requirement if the proponent provides "a certification that complies with Rule 902(11) or (12) or with a statute permitting certification." Montana should modernize its corollary to match.

7 OBJECTION: Lack of personal knowledge, speculation, Rule 602.

RESPONSE: Logical: "Well, almost every book." Better: "This librarian does have personal knowledge, both from her own interactions with Duke and as custodian of his borrowing record, admissible under 803(6) (again).

RULING: Overruled.

EASIEST ROUTE TO ADMISSION: Call the librarian to perform double duty: testify to what she personally observed, and as the foundation witness for the exhibit, Duke's borrowing record.

8 Introduction of the latest editions of each of these "facpacs" as trial exhibits, using UMLS librarian Prof. Stacey Gordon as a foundation witness to verify that the exhibits are in fact actual copies of Duke's actual books:

OBJECTION: Hearsay, Rule 802, out of court statements.

RESPONSE A: Under the 801(c) definition of hearsay, these exhibits do not qualify. They are not being offered to prove what they say, but rather as examples of the work of Prof. Crowley.

RESPONSE B: Your honor, these publications satisfy the ancient documents exception, 803(16), because the witness has verified that each of the exhibits was found in the UMLS collection, and that each is more than 20 years old.

RULING: Overruled.

EASIEST ROUTE TO ADMISSION: Offer the exhibits as straight up exhibits, using both responses above, but if necessary (if the judge looks like she is wavering and might sustain the objection), concede that they are illustrative only. The effect is that they are more easily admitted, but will not go to the jury during its deliberation. [I will devote a later column to this distinction.]

9 OBJECTION: Hearsay.

RESPONSE: This out-of-court statement is not offered to prove in fact that

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these two influences caused Duke's success, but only to show that Duke himself believed this to be true. This purpose, to show the state of mind of the speaker, is another non-hearsay use of out-of-court-statements, per 801(c).

RULING: Overruled.

EASIEST ROUTE TO ADMISSION: Use a witness who had heard Duke make this statement, and preface the question to him with: "Do you know whether Duke believed there were any special influences on his life and work? How do you know that? [Duke told me, several times]. What influences did Duke discuss with you?"

10 OBJECTION: Foundation, Rule 602, lack of personal knowledge.

RESPONSE: The witness (either son Matt or caretaker Jay) does have personal knowledge and observed each of the listed people visit Duke in his last years. Your honor, if necessary, I can also call each of the people who certainly has personal knowledge of his or her own visits, but it is more efficient to simply call the witness who knows about all of them.

RULING: Overruled.

EASIEST ROUTE TO ADMISSION: Defuse the possible objection by simply asking the foundation question up front: "Witness, do you know who visited Professor Crowley in his last years at home? [Yes] How do you know? [I was there and saw them come in and out myself; I usually answered the door, got them coffee and cake, and left them to chat, but let them out at the end of the visits] Ok, please tell us who came regularly? [List...] Rule 602 specifically says "Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

11 OBJECTION: Hearsay.

RESPONSE: This statement is not an assertion, and so it does not fit within 801(c). Commands are not assertions of fact; neither are questions.

RULING: Overruled.

12 OBJECTION: Hearsay.

RESPONSE: Not hearsay under the definition of 801(c), because not offered for the truth of the matter asserted. This is offered to show Duke's state of mind, a well-recognized alternative use of an out-of-court-statement.

RULING: Overruled.

EASIEST ROUTE TO ADMISSION: Use any person who heard Duke say this more than once. My choice would be my other great colleague and Duke's closest confidant, Prof. Emeritus David J. (Patterson, that is).

13 I count myself in this category. If I had known about UMLS when I graduated from college, I would have known it was ideal for me: beautiful location, great faculty and students, and actual instruction in "how" as well as "why." I figured out my mistake a year into law school, and applied to transfer to Missoula. Even though I graduated magna cum laude from one Ivy League school and was enrolled and doing similarly well at an Ivy League law school, Montana had actual standards and refused me. I'm not bitter — but it does amuse me...and is the reason that I do not have first-hand personal knowledge of, and thus could not testify to, Duke's classroom jokes.

Cynthia Ford is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.



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